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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/628,398	08/01/2000	David A. Selby	RSW9-2000-0080-US1	5649

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EXAMINER

BLECK, CAROLYN M

ART UNIT	PAPER NUMBER
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3626

DATE MAILED: 04/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/628,398

Applicant(s)

SELBY, DAVID A.

Examiner

Carolyn M Bleck

Art Unit

3626

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Notice to Applicant

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 9 February 2004 has been entered.
2. This communication is in response to the RCE filed 9 February 2004. Claims 1-26 are pending. Claims 1 and 14 have been amended.

Double Patenting

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-26 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-26 of U.S. Patent Application No. 09/628,400. Although the conflicting claims are not identical, they are not patentably distinct from each other because they recite elements/steps that are substantially the same and that would have been obvious to one of ordinary skill in the art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

(A) Claims 1 and 14 of the present application are substantially the same as claims 1 and 14 of Application No. 09/628,400. The difference appears to be the replacement of the steps "gathering past system-wide reservation information relating to past reservations for perishable commodities that have already perished" and "gathering current reservation information relating to current reservations for perishable commodities that have not yet perished" within Application No. '400, lines 4-7 with the steps of "gathering past reservation information relating to past group reservations for perishable commodities that have already perished, said past reservation information including past reservation information for perishable commodities other than for said first perishable commodity" and "gathering current reservation information relating to a current group reservation for said unperished instance of said first perishable commodity" within Application No. '398, lines 5-11. It is respectfully submitted that within '400 it appears multiple perishable commodities are included within claims 1 and

14. Claims 1 and 14 of '398 also appear to require different perishable commodities from the first perishable commodity. Therefore, the steps of gathering... past reservations for perishable commodities that have already perished and gathering current reservation information relating to current reservations for perishable commodities that have not yet perished ('400 lines 4-7) do not further distinguish claims 1 and 14 of 09/628,398 from Application 09/628,400.

(B) Claims 2-5 and 15-18 of the present application are substantially the same as claims 2-5 and 15-18 of Application No. 09/628,400. The difference appears to be the replacement of the phrase "system-wide" reservation information ('400) with the phrase "reservation information" ('398). It is respectfully submitted that "system-wide" reservation information are considered to be a form of "reservation information" used by a processing device ('398). Therefore the phrase "system-wide" does not further distinguish claims 2-5 and 15-18 of Application 09/628,398 from Application 09/628,400.

(C) Claims 6-13 and 19-26 of the present application are the same as claims 6-13 and 19-26 of Application No. 09/628,400.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-2 and 14-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jung (4,775,936) for substantially the same reasons given in the previous Office Action (paper numbers 3 and 7). Further reasons appear below.

(A) As per claims 1-2, Jung discloses a method utilizing a computer including a processing means (col. 3 lines 18-27) for determining a recommended overbooking level for a scarce resource such as seats on a vehicle, e.g. an aircraft, wherein the recommended level pertains to an airplane flight, such as a flight that travels daily between Detroit and Miami (reads on “unperished instance of a first perishable commodity”) that will occur in the future (note Jung’s discussion of forecasting the booking level) (col. 5 lines 1-45) comprising:

(a) obtaining through an information receiving means and storing for later use, historical traffic flow information including the number of groups booked on a vehicle and the number of groups actually transported on a vehicle, wherein the historical traffic flow information relates to flights that travel between Detroit/Atlanta and Atlanta Miami daily, and wherein there must be at least four flight records for each flight to ensure an accurate historical basis for calculations (col. 1 line 65 to col. 2 line 27, col. 3 lines 27-53, col. 5 lines 1-45, col. 7 line 65 to col. 8 line 22, col. 9 lines 43-52);

(b) receiving passenger reservations through a booking means for a flight from Detroit to Miami that will occur in the future, wherein the number of passenger that can

be booked on the vehicle is set at an optimal level (col. 5 lines 1-45, col. 7 line 65 to col. 8 line 22, col. 9 lines 43-52, col. 10 lines 25-29);

(c) determining an optimal booking level using an overbooking program calculated by taking the average of three other booking levels:

- The first is a demand-based booking level which is based on average "no show" factors. The demand-based overbooking level is calculated such that the vehicle would always be full given average booking statistics;
- The second is an oversale-based booking level which is based on average booking statistics and a standard deviation value which takes predictability into account. The oversale-based booking level is calculated such that the capacity of the vehicle will be oversold a predetermined percentage of the time;
- The final booking level is a prediction-based booking level. This booking level predicts the optimal booking level for the next flight by averaging the demand-based and oversale-based booking levels and determining the linear relationship of the averages. A weighting factor is also applied to the prediction-based booking level. The weighting factor is a function of the mathematical credibility (i.e. the standard error of estimate) of the third booking level. This booking level is found by the following equation $PBBL = M(N+1) + B$, wherein $N+1$ is the next flight to depart;
- The recommended booking level is then determined by averaging the demand-based booking level, the oversale-based booking level and the weighted prediction-based booking level (col. 2 lines 28-52 and col. 7 lines 14-30) and;

(d) displaying the recommended booking level in an overbooking report (col. 8 lines 36-40).

It is respectfully submitted that the recommended booking level is a form of a materialization level as Jung discloses the recommended booking level as a percentage, wherein the level is between 101%-200% for flights which "close" i.e., the flight overbooks. Further, the booking level includes the demand-based booking level which in practical terms is the actual demand for a seat on an aircraft based on historical data including group reservation data (i.e., the materialization of a group reservation) (col. 5 lines 54-68). Although Jung does not include outputting the demand-based booking level (i.e., the materialization level), it is respectfully submitted that the skilled artisan would have found it an obvious modification to Jung's method to output this level with the motivation of quickly adjusting computer overbooking levels based on calculations (Jung; col. 1 lines 58-63).

Furthermore, claim 1 has been amended to include the following:

current group reservation for information "an unperished instance of a first perishable commodity"; and

"past reservation information for perishable commodities other than for said first perishable commodity".

The Examiner provided relevant citations from Jung regarding these limitations above. Further, it is respectfully submitted that the Examiner has used the following logic in interpreting the Jung reference. Firstly, Jung discloses a flight occurring in the future between Detroit and Miami (col. 5 lines 1-45) which is considered to be a form of

Applicant's current group reservation for information "an unperished instance of a first perishable commodity". Secondly, Jung discloses historical flight unit data stored in a database pertaining to at least four flights between Detroit and Atlanta and Atlanta and Miami which is considered to be a form of Applicant's past reservation information for perishable commodities other than for said first perishable commodity. Thus, it is the position of the Examiner that Jung discloses both a current group reservation for information "an unperished instance of a first perishable commodity" and "past reservation information for perishable commodities other than for said first perishable commodity" given the broadest reasonable interpretation of Jung.

(B) Claims 14-15 repeat the subject matter of method claims 1-2, respectively, as computer-readable code stored on media rather than as a series of steps. As the underlying processes of claims 1-2 have been shown to be fully disclosed by the teachings of Jung in the above rejections of claims 1-2, it is readily apparent that the processing means, disk drive in a computer, and computer programs (Jung; col. 3 lines 18-28 and col. 3 line 64 to col. 4 line 8) disclosed by Jung provide the means to carry out these steps. As such these limitations are rejected for the same reasons given above for method claims 1-2, and incorporated herein.

7. Claims 3-13 and 16-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jung (4,775,936) as applied to claims 1 and 14 above, and further in

view of Bowen et al. (5,648,900), for substantially the same reasons given in the previous Office Action (paper numbers 3 and 7). Further reasons appear below.

(A) As per claims 3, 5-6, 8-10, and 12, the relevant teachings of Jung are as discussed in the rejections above, and incorporated herein.

Jung fails to expressly disclose past reservation information including POS (Point-of-Sale) information pertaining to past and current reservations and the demographic information about group coordinators who made past group reservations. Bowen discloses controlling and monitoring of group travel related services including storing in a storage unit information related to a historical and current group control record comprising information such as the name and ID of the owner and organizer of group travel, the group name, the wholesaler's address, the phone number of the owner, the inventory items obtained from a master inventory, the date contained on the inventory item on which unused inventory must be returned to a provider, an airline record locator, departure and arrival cities, the dates of travel (col. 3 lines 25 to col. 4 line 63, col. 8 lines 18-30, col. 10 lines 32-60, col. 11 line 63 to col. 12 line 22, col. 14 line 16 to col. 17 line 25, and col. 20 lines 3-40).

At the time the invention was made, the skilled artisan would have found it an obvious modification to include the aforementioned components of Bowen within the method of Jung with the motivation of enabling airlines and other parties to more easily track group reservations (Bowen; col. 1 lines 50-55) and thus ensuring advance

bookings are at a level which maximizes profits while at the same time minimizing dissatisfaction with supply (Jung; Abstract).

(B) As per claims 4 and 7, Jung discloses obtaining through an information receiving means and storing for later use, historical traffic flow information including the number of groups booked on a vehicle and the number of groups actually transported on a vehicle (col. 1 line 65 to col. 2 line 27 and col. 3 lines 27-53) and the next flights departing (col. 2 lines 28-52 and col. 7 lines 14-30).

(C) As per claims 11 and 13, Jung discloses historical information related to the capacity of each passenger airplane in the fleet (col. 3 lines 28-48) and information on the next flight to depart including the capacity of the airplane (col. 3 lines 28-48 and col. 7 lines 20-25).

(D) Claims 16-26 repeat the subject matter of method claims 16-26, respectively, as computer-readable code stored on media rather than as a series of steps. As the underlying processes of claims 16-26 have been shown to be fully disclosed by the teachings of Jung in the above rejections of claims 16-26, it is readily apparent that the processing means and computer programs (Jung; col. 3 lines 18-28 and col. 3 line 64 to col. 4 line 8) disclosed by Jung provide the means to carry out these steps. As such these limitations are rejected for the same reasons given above for method claims 16-26, and incorporated herein.

Response to Arguments

8. Applicant's arguments filed 9 February 2004 have been fully considered but they are not persuasive. Applicant's arguments will be addressed below in the order in which they appear in the response filed 9 February 2004.

(A) At page 10 of the 20 February 2004 response, Applicant argues that the applied references fail to teach the feature of a comparison of an unperished instance of a first perishable commodity with past reservation information for perishable commodities that have already perished, including for perishable commodities other than the first perishable commodity.

In response, the Examiner respectfully notes that the cited references were never applied as references under 35 U.S.C. 102 against the pending claims. As such, the Examiner respectfully submits that the issue at hand is not whether the applied prior art specifically teaches the claimed features, *per se*, but rather, whether or not the prior art, when taken in combination with the knowledge of average skill in the art, would put the artisan in possession of these features. Regarding this issue, it is well established that references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosures, *In re Bozek*, 163 USPQ 545 (CCPA 1969). The issue of obviousness is not determined by what the references expressly state but by what they would reasonably suggest to one of ordinary skill in the art, as supported by decisions in *In re DeLisle* 406 Fed 1326, 160 USPQ 806; *In re Kell, Terry and Davies* 208 USPQ

871; and *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ 2d 1596, 1598 (Fed. Cir. 1988) (citing *In re Lalu*, 747 F.2d 703, 705, 223 USPQ 1257, 1258 (Fed. Cir. 1988)). Further, it was determined in *In re Lamberti et al*, 192 USPQ 278 (CCPA) that:

- (i) obviousness does not require absolute predictability;
- (ii) non-preferred embodiments of prior art must also be considered; and
- (iii) the question is not express teaching of references, but what they would suggest.

According to *In re Jacoby*, 135 USPQ 317 (CCPA 1962), the skilled artisan is presumed to know something more about the art than only what is disclosed in the applied references. In *In re Bode*, 193 USPQ 12 (CCPA 1977), every reference relies to some extent on knowledge of persons skilled in the art to complement that which is disclosed therein.

According to *Ex parte Berins*, 168 USPQ 374 (Bd. Appeals), there is no statutory limitation as to the number of references that may be used to demonstrate obviousness...not what references expressly state but what they would reasonably suggest to one of ordinary skill in the art. In *In re Conrad*, 169 USPQ 170 (CCPA), obviousness is not based on express suggestion, but what references taken collectively would suggest.

In reference to Applicant's specific arguments that the applied references fail to teach the feature of a comparison of an unperished instance of a first perishable commodity with past reservation information for perishable commodities that have already perished, including for perishable commodities other than the first perishable

commodity, the Examiner respectfully submits that Applicant's statements appear to be misdescriptive of the full teachings of Jung. Claim 1 was amended to include the following:

current group reservation for information "an unperished instance of a first perishable commodity"; and

"past reservation information for perishable commodities other than for said first perishable commodity".

The Examiner provided relevant citations from Jung regarding these limitations above. Further, it is respectfully submitted that the Examiner has used the following logic in interpreting the Jung reference. Firstly, Jung discloses a flight occurring in the future between Detroit and Miami (col. 5 lines 1-45) which is considered to be a form of Applicant's current group reservation for information "an unperished instance of a first perishable commodity". Secondly, Jung discloses historical flight unit data stored in a database pertaining to at least four flights between Detroit and Atlanta and Atlanta and Miami which is considered to be a form of Applicant's past reservation information for perishable commodities other than for said first perishable commodity (col. 5 lines 1-45). Thus, it is the position of the Examiner that Jung discloses both a current group reservation for information "an unperished instance of a first perishable commodity" and "past reservation information for perishable commodities other than for said first perishable commodity", and it is respectfully submitted that the disclosure of Jung, is commensurate with the breadth of claims 1 and 14, and is sufficient to address the

features as claimed, when considered collectively with the knowledge of average skill in the art.

Further, according to MPEP §2111, during patent examination, claims are given their broadest reasonable interpretation consistent with the specification. It is proper to use the specification to interpret what the applicant meant by word or phrase recited in the claim. However, it is not proper to read limitations appearing in the specification into the claim when these limitations are not recited in the claim. See *In re Paulsen*, 30 F.3d 1475, 1480, 31USPQ2d 1671, 1674 (Fed. Cir. 1994); *Intervet America Inc. v. Kee-Vet Lab. Inc.*, 887 F.2d 1050, 1053, 12USPQ2d 1474, 1476 (Fed. Cir. 1989). Words of the claim are generally given their ordinary and customary meaning, unless it appears from the written description that they were used differently by the Applicant. Where an Applicant chooses to be his or her own lexicographer and defines terms with special meanings, he or she must set out the special definition explicitly and with “reasonable clarity, deliberateness, and precision” in the disclosure to give one of ordinary skill in the art notice of the change. See *Telexflex Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1381 (Fed. Cir. 2002), *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001), and MPEP §2111.01. Pursuant to 35 U.S.C. § 112, 2nd paragraph “[I]t is applicant’s burden to precisely define the invention, and not the [examiner’s].” *In re Morris*, 127 F.3d 1048, 1056, 44 USPQ2d 1023, 1029 (Fed. Cir. 1997). Therefore, it would not be proper for the Examiner to give words of the claim special meaning when no such special meaning has been defined by the Applicant in the written description. In addition, it is noted that where a definition set

forth in the written description is merely exemplary (where Applicant uses the phrase "for example") the Examiner should not consider this a special definition.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., at page 10 of the 9 February 2004 response, "a particular flight leg or particular itinerary for travel") are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

(B) Applicant's remaining arguments given at pages 11-12 of the response filed 9 February 2004 rely upon or rehash the issues addressed in the previous Office Action (paper number 7), and are therefore moot in view of the responses given in sections 7(A)-7(B) of paper number 7, and incorporated herein.

Conclusion

9. The prior art made of record and not relied upon is considered pertinent to Applicant's disclosure. The cited but not applied prior art teaches an apparatus and method of allocating flight inventory resources based on the current market value (6,085,164).

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn Bleck whose telephone number is (703) 305-

3981. The Examiner can normally be reached on Monday-Thursday, 8:00am – 5:30pm, and from 8:30am – 5:00pm on alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Joseph Thomas can be reached at (703) 305-9588.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Receptionist whose telephone number is (703) 306-1113.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

11. **Any response to this action should be mailed to:**

Commissioner of Patents and Trademarks
Washington, D.C. 20231

Or faxed to:

(703) 872-9306 or (703) 872-9326

[Official communications]

(703) 872-9327 [After Final communications labeled "Box AF"]

(703) 746-8374 [Informal/ Draft communications, labeled
"PROPOSED" or "DRAFT"]

Hand-delivered responses should be brought to Crystal Park 5, 2451 Crystal Drive,
Arlington, VA, 7th Floor (Receptionist).

CB
April 15, 2004

Alexander K. Kowalewski
Alexander Kowalewski
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